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In The

Supreme Court of the United States

IN RE: WILLIAM MAYS, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF CYNTHIA ANN YOSHA SNYDER, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF BRANDON ABRAHAM YOSHA, TRUSTEE OF THE LOUIS BUDDY YOSHA CHARITABLE REMAINDER UNITRUST FOR THE BENEFIT OF JANET E. YOSHA, TRUSTEE OF THE IRREVOCABLE TRUST AGREEMENT OF LAURA SUE YOSHA,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Seventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Is the request for a Writ of Mandamus inappropriate because the Court of Appeals for the Seventh Circuit expressly denied Petitioners' appeal on the charitable foundation issue when it decided that no contract existed?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

The parent corporation of Respondent Trump Indiana, Inc., is Trump Hotels & Casino Resorts, Inc. Trump Hotels & Casino, Inc., owns 10% or more of Respondent's stock.

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I. STATEMENT OF THE CASE

Respondent Trump Indiana, Inc., Defendant below (hereinafter "Trump Indiana") believes the Statement of the Case submitted by Petitioners William Mays and Louis Buddy Yosha, Plaintiffs below (hereinafter "Mays and Yosha"), should be modified and supplemented as follows.

Mays and Yosha's Statement of the Case contains the following passage.

> The District Court refused to enforce the Charitable Foundation contract. The defendant Trump argued, and the District Judge held, that because the contract between Trump and the plaintiffs to create the Charitable Foundation would bestow a financial benefit upon established charities that served residents of the City of Gary, the Mayor of the City of Gary was actually a third party beneficiary of the contract, by virtue of his elected office. (App. P. 36a)
>
> The District Court held that the Mayor, as the "third party beneficiary," could agree with Trump to reduce Trump's funding obligation to less than 10% of the original agreed amount, in return for Trump redirecting that benefit to a newly created charity, serving a different group of the Mayor's constituents, and to substitute the Mayor and his employees as the fund administrators.

Petition for Writ of Mandamus, pp. 2-3. Using this as a springboard, Mays and Yosha argue, "The District Court determined that the Mayor, solely by virtue of his office, became the third party beneficiary of a contract between plaintiffs and Trump . . . and as such the Mayor was

empowered to intercept and redirect the funds. . . . . " Petition for Writ of Mandamus, p. 8.

These passages inaccurately summarize the District Court's ruling. The District Court's findings on this issue were that the residents of the City of Gary were the intended third-party beneficiaries of the contract entered into with Yosha and Mays. (Finding of Fact 31; Petitioner's App. 36a) The City of Gary acted for the benefit of the third-party beneficiaries in its negotiations with Trump Indiana. (Finding of Fact 32; Petitioner's App. 36a) The charitable foundation that was actually formed replaced the charitable trust contemplated in Trump Indiana's agreement with Mays and Yosha. (Finding of Fact 33; Petitioner's App. 36a)

Mays and Yosha's Statement of the Case further implies this was the only basis for the District Court's decision, omitting all of the other reasons supporting the ruling. In fact, the District Court's ruling was supported by several other findings and conclusions, including the following:

- The contract was not sufficiently specific to permit specific performance. (Finding of Fact 38; Petitioner's App. 37a)

- The creation of a charitable foundation in place of the one contemplated in the agreement between Mays and Yosha was an equitable substitute for the charitable foundation originally contemplated. (Conclusion of Law 22; Petitioner's App. 42a)

- It would be vain and useless to establish a second foundation to serve the same purpose as the

existing foundation. (Conclusion of Law 25; Petitioner's App. 43a)

- Ordering a second charitable foundation would have resulted in a double recovery. (Conclusion of Law 26; Petitioner's App. 43a)

- Mays and Yosha's charitable foundation claim intermingled specific performance and money damages, requiring the District Court to speculate in order to make a monetary award. (Conclusion of Law 27; Petitioner's App. 43a)

- The contract could not be specifically enforced without significantly modifying the contract. (Conclusion of Law 28; Petitioner's App. 44a)

- Because Mays and Yosha essentially sought money, they had an adequate remedy at law that precluded specific performance. (Conclusion of Law 29; Petitioner's App. 44a)

II. ARGUMENT

Rather than seeking certiorari, Mays and Yosha seek a writ of mandamus to compel the Court of Appeals to address an issue they say was neglected on appeal. It is no surprise Mays and Yosha eschew certiorari, for it is not available in a case such as this, which was resolved through the application of routine state contract law. With the certiorari door tightly closed, Mays and Yosha fix their gazes upon mandamus.

Mays and Yosha contend the Court of Appeals "did not address the separate jury finding of breach of the contract to create and fund the Charitable Foundation. Nor did it address the plaintiff's appeal of the District Court's refusal to enforce a remedy for Trump's breach of

obligation to create and fund the Charitable Foundation." Petition for Writ of Mandamus, p. 4. The Court of Appeals' decision shows otherwise.

The Court of Appeals recognized it was dealing with a single contract when it framed the issue it faced. "The pivotal issue is whether the alleged contractual agreement Mays and Yosha say they had with Trump was sufficiently certain to create the two enforceable obligations they seek to establish." (*Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 357 (2001); Petitioner's App. 13a). "The first obligation would require Trump to cut Mays and Yosha in on the final deal to the extent of a 1 percent . . . ownership interest for each. The second obligation would be to create a charitable foundation exactly as described in the letters of February 26, April 6, and September 26 of 1994." (*Id.*; Petitioner's App. 13a)

The Court of Appeals recognized that the appeal involved an attempt to enforce two separate obligations found in a single agreement. In light of this, the assertion that the Court of Appeals ignored Mays and Yosha's charitable foundation appeal is untrue. The appellate court did not forget to address the existence of a contract relating to the charitable foundation. It found that no contract existed. Period! This "no contract" ruling applied to both of the obligations Mays and Yosha sought to impose.

The Court of Appeals' ruling was simple and unequivocal. "[W]e think no binding contractual agreement was reached." (*Mays*, 255 F.3d 351, 357; Petitioner's App. 13a) "[T]his complicated deal was never reduced to the kind of solid contract that could be comfortably

enforced in a court of law." (*Id.* at 359; Petitioner's App. 16a) The effect of this decision was also simple and unequivocal: Mays and Yosha are not entitled to recover on their contract claims. This includes their charitable foundation claim.

"The remedy of mandamus is a drastic one to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 190 (1980); *Kerr v. United States Dist. Ct. for the Northern District of California*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2124 (1976). Mandamus is not intended to be a substitute for appeal. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 660, 98 S.Ct. 2552, 2556 (1978) (*quoting Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 941 (1943)). The party seeking this remedy must demonstrate "exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form . . . ." Sup. Ct. R. 20; *Hohn v. United States*, 524 U.S. 236, 263, 118 S.Ct. 1969, 1983 (1998).

There is nothing extraordinary about what happened here. The Court of Appeals addressed the basic issue that was determinative of Mays and Yosha's claims. When it ruled that there was no contract, it necessarily decided the charitable foundation question.

III. CONCLUSION

There is no basis for mandamus for there is nothing left to be done by the Court of Appeals. The Petition for Writ of Mandamus should be denied.

Respectfully submitted,

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